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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 594

AMERICAN CIVIL LIBERTIES UNION, A NEW YORK CORPORATION AND CHARLES LIEBMAN,

Appellants,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, MARTIN H. KENNELLY, MAYOR, AND TIMOTHY J. O'CONNOR, COMMISSIONER OF POLICE,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

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STATEMENT AS TO JURISDICTION.

OPINION BELOW.

This is an appeal from an order of the Illinois Supreme Court accompanying an opinion reported at 3 Ill. (2d) 334, 121 N. E. (2d) 513. A copy of the opinion is attached as "Appendix A."

GROUNDS ON WHICH JURISDICTION IS INVOLVED.

By their Complaint for a Declaratory Judgment and Injunction, plaintiffs drew in question the validity of an ordinance of the City of Chicago on the ground that it is

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repugnant to the First and Fourteenth Amendments to the United States Constitution. The judgment of the Supreme Court of Illinois, of which plaintiffs seek a review on this appeal, upheld the validity of the ordinance.

On May 24, 1954 the Supreme Court of Illinois reversed the decree of the Circuit Court of Cook County, entered on July 21, 1953. The order of the Circuit Court is attached as "Appendix B." On June 18, 1954 a petition for rehearing was filed by plaintiffs, which was denied on September 20, 1954. Notice of appeal was filed in the Supreme Court of Illinois on December 16, 1954.

The jurisdiction of the Supreme Court of the United States to review the judgment by direct appeal is conferred by Section 1257 (2) of the Judicial Code of the United States (62 Stat. 929, 28 U. S. C. 1257(2)) which provides that judgments of the highest court of the state may be reviewed by the Supreme Court of the United States by appeal where the validity of a state statute is constitutionally questioned and the decision is in favor of the validity of the statute. The jurisdictional statute as construed by this court puts such judgments as to ordinances on the same plane as judgments as to state statutes. The following decisions sustain the jurisdiction of this court:

Lovell v. *City of Griffin*, 303 U. S. 444 (1938).

Winters v. *New York*, 333 U. S. 507 (1948).

Pope v. *Atlantic Coast Line Railroad Company*, 345 U. S. 379 (1953).

Johnson v. *Muelberger*, 340 U. S. 581 (1951).

Rescue Army v. *Municipal Court*, 331 U. S. 549 (1947).

King Mfg. Co. v. *Augusta*, 277 U. S. 100 (1927).

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The ordinance involved is Chapter 155 of the Municipal Code of the City of Chicago, Sections 1 through 7, which prohibit the public showing of films without the obtaining of a permit from the Commissioner of Police. The provisions of the ordinance are set forth in "Appendix C."

QUESTIONS PRESENTED.

This is a declaratory judgment action brought by plaintiffs against the City of Chicago, directly challenging the constitutional validity of a licensing system under which no motion picture film may be publicly exhibited unless the Commissioner of Police issues a permit for it. Such a permit may issue only after the Commissioner of Police determines that a film is neither "immoral" nor "obscene". Plaintiffs attack this licensing system on the basis of its unwarranted infringement upon the right of free expression.

Since the relief sought by plaintiffs was a declaration that the Chicago motion picture censorship ordinance is void because it imposes a prior restraint on free expression, and that plaintiffs are entitled to exhibit "The Miracle" without first obtaining a permit, and since the Illinois Supreme Court found, with finality, that the ordinance is valid because the standard "obscene" properly supports a system of prior restraint, plaintiffs seek review of the following question:

> May a city prohibit the public exhibition of every motion picture unless the exhibitor first submits the motion picture to its Commissioner of Police, and unless the Commissioner of Police (or on appeal, the Mayor) first views the picture and determines that in his opinion the motion picture is not immoral or obscene?

STATEMENT OF THE CASE.

Plaintiffs were refused a permit by the Police Commissioner to show the film entitled "The Miracle". This refusal was sustained by Mayor Martin H. Kennelly. The police commissioner, the mayor, and the City of Chicago were made defendants in an action brought by plaintiffs requesting a judgment declaring the ordinance under which the defendants were acting void and restraining the defendants from interfering with plaintiffs' right to exhibit the motion picture. Among other things the complaint alleged that the object and purpose of the suit was to obtain a declaration of the unconstitutionality of the ordinance providing for censorship of motion pictures. An actual controversy was alleged to exist by virtue of the fact that the defendants contended that plaintiffs could not, except under threat of arrest and criminal prosecution, exhibit the motion picture without first obtaining a permit. The complaint alleged that the defendants refused to issue such permit, and that the requirements of the ordinance were an infringement and denial to the plaintiffs of the constitutional rights secured to them by the First and Fourteenth Amendments to the Constitution of the United States.

One of the prayers in the complaint is:

> "That the Court order and declare that Sections 155-1 to 155-7 of the Municipal Code of the City of Chicago are invalid and unconstitutional and of no force and effect, and that Plaintiffs have the right to exhibit the motion picture film 'The Miracle' without first obtaining a permit from any official of the City of Chicago."

The defendants joined issue by denying that the Chicago motion picture censorship ordinance was contrary to the Constitutions of Illinois and the United States.

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The trial court found that the ordinance in question violates the constitutional guarantees of free expression and that the licensing system of the ordinance is contrary to the First and Fourteenth Amendments to the United States Constitution. We have appended the findings of the trial court as "Appendix B."

Defendants appealed to the Illinois Supreme Court which reversed the judgment of the trial court and held that the ordinance in question does not violate the Constitutions of Illinois or of the United States. This reversal means, therefore, that a person desiring to exhibit a motion picture film in Chicago must first apply for a permit from the Police Commissioner; and that the Police Commissioner may grant the permit only if in his judgment the film is not "immoral" or "obscene", under the standards outlined in the court's opinion.

THE FEDERAL QUESTION IS SUBSTANTIAL.

I.

The Present Law Relating to Censorship Needs Clarification.

In the case of *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952), this court expressly reserved decision on the question "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films." On the other hand, it has in four cases held certain acts of censorship unconstitutional:

Joseph Burstyn, Inc. v. *Wilson*, 343 U. S. 495 (1952).

Gelling v. *Texas*, 343 U. S. 960 (1952).

Superior Films, Inc. v. *Department of Education*, 346 U. S. 587 (1954).

Commercial Picture Corporation v. *Board of Regents*, 346 U. S. 587 (1954).

These decisions have left the law in a state of uncertainty, and state supreme courts are urgently in need of guidance. The Illinois Supreme Court, being confronted with the very film involved in the *Burstyn* case under an obscenity statute, felt called upon to write a decision outlining the law of obscenity without either specifically affirming or reversing the lower court's decree. In speaking of the decisions of this court, the Illinois Supreme Court said:

> "In view of the language of the opinion of the court in the *Burstyn case*, and particularly because the views expressed in the specially concurring opinion in the *Superior Films case* were apparently not shared by a majority of the court, we do not regard those decisions as invalidating all film censorship. Their precise scope, however, is not easy to determine. On the one hand, *they may be interpreted* as holding that the statutes immediately involved were invalid, either because the standards employed fail to reflect an interest which the State might legitimately protect, or because those statutes, although applicable to films of a sort which might constitutionally be subjected to censorship, were so broad, or so vaguely drawn, as also to sanction the suppression of films which may not constitutionally be censored. On the other hand, *the Supreme Court may have considered* those statutes as purporting in terms to forbid no more than that which a State may forbid, and yet have reversed because of its determination that the particular films involved did not possess those qualities which would justify censorship, or because the State had not at any rate made a sufficient showing that such qualities were present." (Emphasis added.)

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The Supreme Court of Ohio was equally puzzled. That court in *RKO Radio Pictures, Inc.* v. *Department of Education*, Ohio Supreme Court, Dec. 1954 (23 Law Week 2270), was compelled to rule upon an order of the Department of Education censoring a film under an Ohio State Statute which had already been repeatedly before the highest court of Ohio and twice before the Supreme Court of the United States: *Mutual Film Corporation* v. *Industrial Commission*, 236 U. S. 247 (1915); *Superior Films, Inc.* v. *Department of Education*, 346 U. S. 587 (1954). The justices of the Supreme Court of Ohio were unable to agree on the constitutionality of the very statute which had been before this court twice. The majority opinion stated:

> "But regardless of the meaning of the language of Mr. Justice Clark, quoted above, the fact remains that the Supreme Court of the United States in the *Superior Films* case reversed the decision of this court in clear and unmistakable language without qualification."

One of the dissenting justices, on the other hand, said:

> "The basic difference of opinion among the members of this court is whether the federal Supreme Court has in fact held the Ohio statutes unconstitutional. The conclusion of the majority seems to be that this has been done inferentially. It is the view of the minority that if, at a time when delinquency—both juvenile and adult—is a problem of unprecedented concern, the federal Supreme Court intends to hold that every film no matter how obscene, profane, inflammatory or subversive can be shown, this is too serious a matter to be left to mere inference alone."

Another of the dissenting justices stated:

> "The Ohio statute giving the defendant censoring jurisdiction was expressly held valid and constitutional in the case of *Mutual Film Corp.* v. *Industrial Commission of Ohio*, 236 U. S. 230, 59 L. Ed. 552,

> 35 S. Ct., 387 Ann. Cas. 1916C, 296. The *Burstyn* case did not expressly overrule the *Mutual Film* case as to the constitutionality of the Ohio statute but held, contrary to the holding of the Ohio Supreme Court in that case, only that *motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of 'speech' or to the 'press'.* The court in so holding said that, *'to the extent that language in the opinion in Mutual Film Corp.* v. *Industrial Comm'n., supra,* is out of harmony with the views here set forth, we no longer adhere to it."

Since, under Ohio law, the concurrence of six justices is required to declare a statute unconstitutional and only four concurred in the majority opinion, we have the anomalous situation of the court concluding that any censoring order made by the Department of Education is "unreasonable" and "unlawful" but the statute still remaining in effect.

Censoring authorities, lower courts and other state supreme courts will not find the task of interpreting the law relating to film censorship any easier than the Illinois and Ohio Supreme Courts. To bring clarity into the law, it is urgently necessary that this court decide the question mooted in the *Burstyn* case, *i.e.*, whether prior restraint under an obscenity statute may be constitutionally imposed. The case at bar presents that precise question.

The judgment rendered by the Supreme Court of Illinois herein is directly appealable to this Court under Section 1257(2) of the Federal Judicial Code because the Illinois court decided all Federal questions which were raised by the appellants in the state courts. The Supreme Court of the United States will entertain direct appeals from the highest state court when that court has finally decided the federal questions which were raised in the state courts.

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This is true even though the State Supreme Court has remanded the proceedings to a lower court for further proceedings in connection with other matters not pertinent to the federal issues. See *Pope* v. *Atlantic Coast Line Railroad Company*, 345 U. S. 379 (1953), *Johnson* v. *Muelberger*, 340 U. S. 581 (1950).

In the present case, the Illinois Supreme Court rejected appellants' contention that the Chicago Municipal Ordinance in question was unconstitutional. The court concluded that the ordinance was in fact constitutional according to the interpretation it gave to the wording of the ordinance. This conclusion cannot be altered, modified or affected in any manner by the Illinois trial court upon remand, for that court is bound by the plenary appellate jurisdiction of its Supreme Court. No matter what decision is reached by the lower Illinois court concerning the obscenity of the movie, appellants will have to comply with the censorship requirements of the Chicago ordinance. And appellants contend that any compliance with this ordinance interferes with their constitutionally guaranteed liberties.

II.

A Licensing System By Which Motion Pictures Are Subjected in Advance to an Administrator's Ruling as to Whether or Not They May Be Exhibited Is Repugnant to the Constitution of the United States.

None of the cases involving motion picture censorship has answered, because in none of them was the Court called upon to answer, the critical question: Can prior censorship of motion pictures be squared with constitutional guarantees?

Near v. *Minnesota*, 283 U. S. 697 (1931), the touchstone ruling on prior restraint, has been neglected in part in

subsequent decisions. In that case, the Court held expression to be inviolate from prior restraint except in extreme situations. The Court considered a statute which permitted the entry of an injunction against publication of certain types of literature. The case had arisen when a "yellow sheet", which had been attacking the officials of Minneapolis, was enjoined from publishing "malicious" and "defamatory" remarks. This Court struck down the injunction and the statute upon which it was based.

In the *Near* case this Court found that a licensing system is repugnant to the guarantees of free speech and free press which are basic to our constitutional system. The proponents of censorship, however, find comfort in the language which the Court used in carving out exceptions to the general prohibition (p. 716):

> "The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.' *Schenck* v. *United States*, 249 U. S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government."

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Even in the quoted paragraph, exceptions to the rule against censorship are justified only in an extreme case, *i. e.*, where there is a "clear and present" danger to our society. The police power of the states may invade private rights for the purpose of protecting against the likelihood, *but not against the mere possibility*, of riots or overt acts which would threaten the public safety. This likelihood must be manifested in clear terms, and, for any censorship to be justified or tolerated, the values sought to be protected must be such as are capable of protection *only* by a licensing system.

In the *Near* case, the examination of the history of the First Amendment revealed that prior restraint—as opposed to subsequent prosecution—was the encroachment on free expression which the First Amendment was designed to avoid. In viewing the purpose of the First Amendment, the Court said, at pages 713-14:

> "The question is whether a statute authorizing such proceedings (prior injunctions) in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that *it is the chief purpose of the guaranty to prevent previous restraints upon publication.* (Emphasis supplied.) * * * The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.' * * * This court said in *Patterson* v. *Colorado*, 205 U. S. 454, 462: 'In the first place, the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. * * *' "

Here, then, is the background of history for these words of the First Amendment "Congress shall make no law • • • abridging the freedom of speech or of the press."

Near v. *Minnesota* lays down a rule against any prior restraint of communication except where there is a clear and present danger, or where a substantial value cannot be protected in any manner other than by previous restraint. The Illinois court conceded that the rule has full force as to motion pictures. Nevertheless, the court held that "obscenity" was a proper standard for censorship; and that the values of decency in the community require the use of prior restraint. We submit that under the decisions of this Court this conclusion is at variance with constitutional guarantees.

III.

A Licensing System Which Places in an Administrative Official the Power to Reject Motion Pictures Ignores Both the Constitutional Restriction on Prior Restraint and the Alternative Modes of Protecting Social Values Which Do Not Amount to Prior Restraint.

We are not faced here with an application of emergency action to prevent the imminent outbreak of violence or to safeguard a war effort, or the like. Nor are we faced with the application of police power in an area where the only method of preserving legitimate social values is through the application of prior licensing laws. The Chicago censorship ordinance provides that *every* motion picture be first submitted for the censor's approval before any public exhibition may be permitted.

Although there can clearly be serious damage to persons or groups resulting from libelous publications, no one would suggest that before publication a court could en-

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join publication of printed material because it might be libelous. The laws of libel and slander are available to redress the individual and community wrongs. In *Near* v. *Minnesota*, the Court did not examine the contents of the scurrilous literature. There was some indication that the Court thought that it infringed the libel laws. Nevertheless, the Court refused to approve a statute which permitted prior restraint. See also *Lovell* v. *Griffin*, 303 U. S. 444 (1938).

Libel laws and obscenity laws both protect vital community values. Both are essential for the establishment of that corollary of free speech, namely, responsibility; and, to achieve responsibility and to protect the public, both libel and obscenity laws should be applied. But, as was seen in *Near* v. *Minnesota*, libel and obscenity laws should be applied so as not to interfere with free and responsible speech. See also *Patterson* v. *Colorado*, 205 U. S. 454 (1907).

If we place all speech under the preview of a licensor because otherwise a given communication might be libelous or obscene, we deny freedom of speech.

The Illinois Supreme Court has now said that obscenity is a clear standard and that the community has a right to protect itself against obscenity. Assuming for the sake of argument that both these propositions are correct, the constitutional problem remains: Is prior censorship the proper or even a permissible way to protect the community?

There is a constitutional way of protecting the community from obscene utterances and thereby preserving the community value of morality, which seems to be the underlying justification for any action directed at obscene publications. It is through the criminal sanctions imposed on dissemination of obscene matter. Illinois Revised Statutes, 1953, Chapter 38, sections 402-44 and 468-472, set

forth the legal bounds of proper publication and radio broadcasting, as well as the legal bounds for exhibiting motion pictures. These are criminal sanctions, which provide a fine as well as imprisonment. There is no showing that these laws have failed to prove adequate in the past to punish improper publication. Under them, persons are held accountable for their utterances and publications. But the general stream of communication is not subjected to the licensor's stamp.

Courts have held that a society is not powerless to deal by criminal sanctions with fighting words, *Chaplinski* v. *New Hampshire*, 315 U. S. 568 (1941); with speech or expression which is dangerous in time of crisis, *Schenck* v. *United States*, 249 U. S. 47; with libelous matter, *Near* v. *Minnesota*, *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952); nor with obscenity, *People* v. *Doss*, 384 Ill. 400, cert. den. 321 U. S. 789 (1944). Equally well established is the principle that previous restraint by censorship is neither the constitutional nor the accepted mode of dealing with such problems.

Since the *Near* case, only the motion picture field has presented an active licensing system imposed in advance on the content of communications. With the finding in the *Burstyn* case, motion pictures no longer present a special category, and the licensing laws for motion pictures should be struck down as unnecessary for the protection of community values and repugnant to our constitutional framework.

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IV.

The Term "Obscenity" Does Not Provide a Clear Standard By Which Motion Pictures Can Be Censored.

In the case at issue, the Illinois Supreme Court held that motion pictures could be censored under the Chicago Censorship Ordinance if the motion picture in question were "obscene or immoral" within the language of the ordinance. The Court, in defining what an obscene picture was, said:

> "We hold, therefore, that a motion picture is obscene within the meaning of the ordinance if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. In making this determination the film must be tested with reference to its effect upon the normal, average person."

By this definition, as was indicated in the opinion, the Illinois Court apparently felt that it was supplying an answer to the question left open by this Court in *Winters* v. *New York*, 333 U. S. 507 (1948), and *Burstyn* v. *Wilson*, 343 U. S. 495 (1952), as to whether censorship will be tolerated where the object of censorship is obscenity and the statute is clearly drawn.

Let us examine this question against the background of the operational facts of censorship under Sections 155-1 through 155-7 of the Municipal Code of Chicago. A motion picture is filmed, printed, and generally distributed to various cities and town throughout the nation. When a film, whether it be "Bambi" or "The Miracle" arrives in Chicago, the distributor who hopes to exhibit it must present the film to the Chicago Police Department. Then

the employees engaged in motion picture censorship, under the direction of the Commissioner of Police, view the picture in an effort to determine whether it may be licensed, in whole or in part. These employees must determine whether the film is "immoral" or "obscene". If they determine that it is "immoral" or "obscene", it may not be licensed for exhibition in Chicago, unless the Mayor reviews and reverses the decision.

The question, therefore, becomes: Are the terms "immoral" and "obscene" sufficiently clear standards to guide an administrator's decision?

That an administrator entrusted with problems dealing with free expression must be furnished standards of even greater definiteness and clarity than are juries and judges is well stated in *Kunz* v. *New York*, 340 U. S. 290 (1951). An administrator entrusted with problems relating to free expression stands on the most precious ground of liberty. In *Kunz* v. *New York* this Court applied with extreme care and vigor the rule generally applicable to all administrators, that the legal guide-posts set up for their actions must leave little room for deviations. The Court said at page 294:

> "[We] have consistently condemned licensing systems which rest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. In *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), this Court held invalid an ordinance which required a license for soliciting money for religious causes. Speaking for a unanimous court, Mr. Justice Roberts said: 'But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.' "

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Accord: *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951).

The terms "obscene" and "immoral" do not supply the police motion picture censorship employees with the requisite guide-posts for action. "Obscene" and "immoral", as terms, lack the precision required for administrative application. These terms have been the subject of a variety of divergent definitions in courts and elsewhere. *Besig* v. *United States*, 208 F. 2d 148 (C. A. 9, 1953); *Hallmark Productions* v. *Mosley*, 190 F. 2d 904 (C. A. 8, 1951); *Parmalee* v. *United States*, 113 F. 2d 729 (App. D. C., 1940); *Holmby* v. *Vaughn*, Circuit Court, Topeka (Kansas, 1954); *Hallmark* v. *Carroll*, Court of Common Pleas, Philadelphia, Penna. (September, 1954).

The application of the term "obscene" to the motion picture before this Court, "The Miracle", is a case in point. When this very film was first seen by the Court in *Burstyn* v. *Wilson*, *supra*, Mr. Justice Reed found that "The Miracle" was not the type of picture which could be censored. Yet, viewing the same film, Police Commissioner O'Connor and Mayor Kennelly found "The Miracle" to be "immoral and obscene". How can an administrator, then, be expected to apply with clarity a term which lacks concrete definition and application?

A film which may be termed "obscene" by one group may not be "obscene" by the standards of another group. The word is not self-defining. It is not clear and definite. It leaves the administrator—the police censor who has the power to suppress expression—to his own moral standards for the formation of an applicable judgment. The vice of such vagueness, where the administrator is entrusted with suppression of free speech, free press, and free religion, is spelled out in the line of cases which includes *Kunz* v.

New York, 340 U. S. 290; *Hague* v. *C. I. O.*, 307 U. S. 496; *Largent* v. *Texas*, 318 U. S. 418; and *Niemotko* v. *Maryland*, 340 U. S. 268. In addition, this Court expressed a clear mandate in *Winters* v. *New York*, 333 U. S. 507 (1948), that where free expression is concerned a statute must be read with even more care than usual, to avoid approval of vague terms which might deprive persons of their constitutional freedoms.

Has the Illinois Supreme Court, by defining the terms, cured the defect of vagueness? According to the Illinois Supreme Court in the case at issue, the police censor must now view a motion picture to determine if the picture, when considered as a whole, has the *calculated purpose or dominant effect to substantially arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess.* Presumably the censor must balance his judgment as to the dominant effect in arousing sexual desire against the artistic or other merits of the film. He must be both a psychologist and art critic.

Under the Illinois standard, for administrative discretion, the police censor must resolve more elements of doubt and personal opinion than the officials under the laws, already referred to, which were struck down in *Kunz* v. *New York*, or *Cantwell* v. *Connecticut*, *supra*. The Chicago censor is indeed "adrift upon a boundless sea amid a myriad of conflicting currents * * * with no charts but those provided by the most vocal and powerful. * * *" *Burstyn* v. *Wilson*, 343 U. S. 495, 504.

Finally, it should be noted that in its opinion, the Illinois Supreme Court said:

> "So far as the term 'immoral' is concerned, we think that when employed, as here, to describe a basis upon

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> which to impose a prior restraint upon freedom of expression, it must be regarded as little more than a synonym for 'obscene'."

In *Commercial Pictures* v. *Regents of University of New York*, 305 N. Y. 336 (1953), the New York Court of Appeals approved the term "immoral" as a standard for motion picture censorship in connection with the motion picture "La Ronde". But this Court, in a *per curiam* decision, 346 U. S. 587 (1954), reversed the New York Court and followed *Burstyn* v. *Wilson*, 343 U. S. 495 (1952). The effect of this Court's decision, therefore, was to reject the term "immoral" as a basis for prior restraint of expression. If the Illinois Supreme Court is correct that "immoral" is a synonym for "obscene", *Commercial Pictures* v. *Regents* would appear to be controlling.

Because an administrator must have clear standards to guide him—especially where free expression is likely to be the victim of untrammelled administrative judgment—and because the Chicago motion picture censorship ordinance does not supply requisite standards of definiteness and clarity, Sections 155-1 through 155-7 of the Municipal Code of Chicago should be held unconstitutional.

Conclusion.

The vice of a licensing system and the vagueness of the standards in the Chicago ordinance, when considered together, place an unconstitutional burden on those who seek to communicate with others. The film distributor must take every film to the police censor, and must, before showing the film, await the uncertain application of uncertain standards.

The holding of the Illinois Supreme Court directly raises the questions of: (1) the validity of any licensing system,

and (2) the validity of the terms "obscene" and "immoral" as standards for administrative action. Because the Illinois court has made a final ruling in favor of the Chicago motion picture censorship ordinance on both these questions, and because such ruling is contrary to the First and Fourteenth Amendments to the United States Constitution, we believe that the question presented by this appeal is substantial and that it is of public importance.

OPINION BELOW.

The opinion below is attached as "Appendix A".

JUDGMENT BELOW.

Appended to this statement as "Appendix D" is a copy of the order entered on May 24, 1954 by the Supreme Court of Illinois reversing the decree below.

Respectfully submitted,

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APPENDIX A.

(No. 33043.—Reversed and remanded.)

AMERICAN CIVIL LIBERTIES UNION *et al.*, Appellees, *vs.* THE CITY OF CHICAGO *et al.*, Appellants.
3 Ill. 2d 334.

APPEAL from the Circuit Court of Cook County; the Hon. HARRY M. FISHER, Judge, presiding.

JOHN J. MORTIMER, Corporation Counsel, of Chicago, (JOHN C. MELANIPHY, of counsel,) for appellants.

EDGAR BERNHARD, SANFORD I. WOLFF, LEON M. DESPRES, RICHARD ORLIKOFF, and ABNER J. MIKVA, all of Chicago, (F. RAYMOND MARKS, JR., ALEXANDER L. POLIKOFF, and BERNARD WEISBERG, of counsel,) for appellees.

MR. CHIEF JUSTICE SCHAEFER delivered the opinion of the court:

Chapter 155 of the Municipal Code of the city of Chicago makes it unlawful to exhibit any motion picture or to distribute any motion picture to any exhibitor in the city without having first secured a permit from the commissioner of police. The commissioner is required to issue the permit, upon application and payment of the prescribed fee, unless he determines that the picture is "immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being," in which case he is required to refuse a permit. The American Civil Liberties Union and Charles

Liebman, assignees of the right to distribute and exhibit in Chicago a motion picture called "The Miracle," applied to the commissioner for a permit. The commissioner refused to issue it on the ground that the picture was "immoral and obscene." As provided by the ordinance, an appeal was taken to the mayor, who affirmed the commissioner's decision.

The distributors thereupon brought suit in the circuit court of Cook County against the city of Chicago, the mayor, and the commissioner of police. The complaint, to which a print of the film was attached as an exhibit, alleged that the ordinance deprived the plaintiffs of the right of free speech guaranteed by article II, section 4 of the Illinois constitution, and by the first and fourteenth amendments to the United States constitution. In addition to a judgment declaring the ordinance unconstitutional, the plaintiffs sought an injunction to restrain the defendants from preventing the exhibition of the film. By their answer the defendants denied that the ordinance was invalid, and asserted that the picture was immoral and obscene. They also filed a demand for jury trial, and challenged the plaintiffs' right to a declaratory judgment on the ground that there was an adequate remedy at law by way of *mandamus*. No reply was filed by the plaintiffs. The film was viewed by the court over the defendants' objection, and a decree was entered enjoining the defendants from preventing the exhibition of the film. The court has certified that the validity of a municipal ordinance is involved and that the public interest requires a direct appeal to this court.

The most important issue which this case presents is whether the first and fourteenth amendments to the constitution of the United States, and article II, section 4, of the constitution of Illinois permit the censorship of motion

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pictures. The ordinance before us has twice been upheld by this court, and the defendants consider the question settled. The plaintiffs, on the other hand, take the position that those decisions are superseded by subsequent decisions of the United States Supreme Court which the plaintiffs regard as rendering unconstitutional, as a "prior restraint" upon freedom of speech, all censorship of motion pictures. Disposition of the case thus requires a review both of our decisions and of those of the Supreme Court of the United States.

In *Block* v. *City of Chicago*, 239 Ill. 251, decided in 1909, suit was brought to enjoin the city from interfering with the exhibition of two films entitled "The James Boys" and "Night Riders," for which a permit had been denied. The ordinance was sustained against the objection that the terms "obscene" and "immoral" were so broad as to make the delegation of censorship power to the chief of police unconstitutional, and it was also held that no hearing need be allowed before refusing a permit. In 1930 the ordinance again came before the court in *United Artists Corp.* v. *Thompson*, 339 Ill. 595, a case arising out of the denial of a permit to exhibit a film called "Alibi." The court held invalid that part of the ordinance which provided for confiscation, without notice, of films put into distribution after the refusal of a permit, but summarily upheld the licensing provision, stating, "The power of a city to provide for a board of censors and to require a permit before any moving picture can be exhibited in a municipality cannot be doubted." 339 Ill. 595, 602.

In each case the permit was denied on the ground of immorality, a term to which the court ascribed a broad meaning. In the *Block case* it was impliedly held that the portrayal of crimes was immoral, since this would "necessarily" produce evil effects upon youthful spectators, and

the court stressed the point that the typical audience included "those classes whose age, education and situation in life specially entitle them to protection against the evil influence of obscene and immoral representations." (239 Ill. 251, 258, 265.) In the *United Artists case* the police censor board described the picture as portraying numerous crimes of violence and in particular as showing third degree and other brutal practices by the police, which would tend "to create contempt and hatred for the entire police force." (339 Ill. 595, 598.) The court, repeating the remarks make in the *Block case* concerning the necessity of protecting the more susceptible members of the audience, agreed that the film, which it did not view, "could not fail to have a tendency to cheapen the value of human life in the minds of youthful spectators," and that "its exhibition would have a tendency toward immorality and to cause an increasing disrespect for the law and its officers." 339 Ill. 595, 602, 605.

What is most significant about these cases in their present bearing is that neither of them considered or even referred to the constitutional issue of freedom of speech. When the *Block case* was decided in 1909, it had not yet been determined that the freedom of speech which is secured against Federal infringement by the first amendment to the constitution of the United States is also secured by the due process clause of the fourteenth amendment against infringement by the States. (See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 499, 500.) And when the *United Artists case* was decided, motion pictures were not regarded as a form of communication within the protection of the first and fourteenth amendments. (See *Mutual Film Corp.* v. *Industrial Com.*, 236 U. S. 230.) Subsequent decisions of the United States Supreme Court, however, have extended that protection to motion pictures, and we there-

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fore must re-examine the validity of the ordinance in their light.

In the first of these cases, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, the Supreme Court reversed a decision of the Court of Appeals of New York which had sustained censorship of the same film which is before us now. We may say at once that we do not regard that decision as having completely immunized "The Miracle" against censorship. The sole basis of censorship in that case was that the film was sacrilegious; power to censor upon any other basis was not considered by the Supreme Court. That court, while holding that expression of ideas through motion pictures was protected under the first and fourteenth amendments, observed that this protection did not imply "absolute freedom to exhibit every motion picture of every kind at all times and all places," or that the rules governing motion pictures were necessarily the same as those applicable to other media of expression. (343 U. S. 495, 502, 503.) And the court expressly reserved decision on the question "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films." 343 U. S. 495, 506-507. Cf. *Near* v. *Minnesota*, 283 U. S. 697, 716; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; *Winters* v. *New York*, 333 U. S. 507, 518.

The court did emphasize, however, that freedom of expression is the rule, and that particularly in the case of a "prior restraint" a State has a heavy burden to justify an exception to that rule (343 U. S. 495, 503, 504,) a burden which the court held had not been sustained in the case before it. The term "sacrilegious" had been construed by the New York Court of Appeals to include the act of treating any religion "with contempt, mockery, scorn and ridicule," or any "visual caricature of religious beliefs held sacred

by one sect or another." (303 N. Y. 242, 258, 101 N. E. 2d 665, 672.) The Supreme Court observed that this statutory standard was so broad as to vest unlimited discretion in the censors, and that "the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views." 343 U. S. 495, 504, 505.

Shortly after the *Burstyn* decision the court, in *Gelling* v. *Texas*, 343 U. S. 960, reversed without opinion a conviction for exhibiting a picture which had been denied a license under the terms of an ordinance permitting a license to be withheld if the censors should be of the opinion that the film was "prejudicial to the best interests" of the local residents.

More recently the Supreme Court has reversed two other State court decisions which upheld censorship. In *Superior Films, Inc.* v. *Department of Education*, 159 Ohio St. 315, 112 N. E. 2d 311, a permit was refused the motion picture "M" under an Ohio statute providing that "Only such pictures as are in the judgment and discretion of the deparment of education of a moral, educational or amusing and harmless character shall be passed and approved." (Ohio Rev. Code 1953, sec. 3305.04.) The basis for the censors' refusal was that "the effect of this picture on unstable persons of any age level could lead to a serious increase in immorality and crime" and that the film presented a story of criminal perversion in such a way as to result in sympathy for it rather than a constructive plan for dealing with it. The Ohio court upheld the power of the State to censor films for the sake of protecting decency and morals, and met the charge that the statute was vague by relying upon the *Mutual Film case*, 236 U. S. 230, which involved the same Ohio statute, and which, the court stated, had not been overruled on this point by the *Burstyn case*.

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Two dissenting judges regarded the latter decision as invalidating the Ohio censorship statute.

Commercial Pictures Corp. v. *Board of Regents*, 305 N. Y. 336, 113 N. E. 2d 502, involved the movie "La Ronde," which had been suppressed on the grounds that it was "immoral" and "would tend to corrupt morals." (See N. Y. Educ. Laws, sec. 122.) The New York Court of Appeals held that the State was entitled to take measures to preserve marriage, the home, and the moral welfare of its citizens against a picture like this, which in the court's view presented adultery and fornication in such a seductive manner as to invite imitation by the audience. Construing the term "immoral" to refer solely to sexual immorality, the majority of the court considered that there was no unconstitutional vagueness present. Two members of the court dissented.

The Supreme Court reversed both the Ohio and the New York decisions in a memorandum opinion citing the *Burstyn case*. Justices Douglas and Black concurred on the ground that all censorship of films was forbidden by the first amendment. *Superior Films, Inc.* v. *Department of Education*, 346 U. S. 587.

In view of the language of the opinion of the court in the *Burstyn case*, and particularly because the views expressed in the specially concurring opinion in the *Superior Films case* were apparently not shared by a majority of the court, we do not regard those decisions as invalidating all film censorship. Their precise scope, however, is not easy to determine. On the one hand, they may be interpreted as holding that the statutes immediately involved were invalid, either because the standards employed fail to reflect an interest which the State might legitimately protect, or because those statutes, although applicable to films of a sort which might constitutionally be subjected to

censorship, were so broad, or so vaguely drawn, as also to sanction the suppression of films which may not constitutionally be censored. On the other hand, the Supreme Court may have considered those statutes as purporting in terms to forbid no more than that which a State may forbid, and yet have reversed because of its determination that the particular films involved did not possess those qualities which would justify censorship, or because the State had not at any rate made a sufficient showing that such qualities were present. In any event, we do not regard these decisions as automatically compelling us to overrule this court's prior approval of the Chicago censorship ordinance. We do regard them, however, as requiring a re-examination of that ordinance in terms of the standards and the procedures which are available to the State in the highly sensitive area of prior restraint upon the expression of ideas.

Considering first the standards of the ordinance, censorship in this case rests upon the ground that the film is "immoral and obscene."

With respect to the term "obscene," a large body of doctrine has been developed in the course of prosecutions for the sale of obscene literature and for depositing it in the mail, libels under the tariff act to prevent its importation, and, more recently, in Massachusetts, proceedings in the nature of a declaratory judgment to determine whether a book is obscene. (See New York Penal Law, section 1141; Mass. G. L. (Ter. Ed.) c. 272, sections 28-28G; 18 U. S. C. 1461, 1462, 1463, 1464; 19 U. S. C. 1305; 39 U. S. C. 259a.) This court, on the other hand, has seldom had occasion to construe the term. In *People* v. *Friedrich*, 385 Ill. 175, 179, we interpreted it to mean "offensive to the chastity of mind, delicacy and purity of thought, * * * suggestive of lustfulness, lasciviousness and sensuality." Apart from

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this rather general statement, we find no treatment of the problem in our decisions, and we therefore turn to those from other jurisdictions. These cases, in the main, involve literary publications. We do not think, however, that the meaning of the term "obscene" varies with the particular medium of expression. No such inference may be drawn from the language of this and other ordinances dealing with obscenity, nor from the statutory provisions on the subject with reference to which the ordinance should be construed. See Ill. Rev. Stat. 1953, chap. 24, par. 23-57; chap. 38, pars. 468, 469, 470; Municipal Code of Chicago, secs. 192-7, 192-9, 192-10.

The most cursory survey reveals that despite the extensive consideration which the courts have given it, the concept of obscenity remains elusive. See *Bantam Books, Inc.* v. *Melko*, 25 N. J. Sup. 292, 96 Atl. 2d 47; *Commonwealth* v. *Gordon*, 66 Pa. Dist. & Co. 101; *Parmelee* v. *United States*, 113 Fed. 2d 729; 69 A. L. R. 644; 76 A. L. R. 1099; 81 A. L. R. 801; Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40; Jenkins, The Legal Basis of Literary Censorship, 31 Va. L. Rev. 83; Notes, 47 Columbia L. Rev. 686; 34 Cornell L. Q. 442; Chafee, Free Speech in the United States, pp. 529-548; I. Chafee, Government and Mass Communications, pp. 200-366.

The test as originally laid down in 1868 by Cockburn, C. J., in *Regina* v. *Hicklin*, L. R. 3 Q. B. 360, 371, was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall." In applying that formula American courts have repeatedly stated that the mere use of coarse or vulgar language, or even references to sexual misbehavior, do not amount to obscenity so long as no tendency toward sexual stimulation is present. *Swearingen* v.

United States, 161 U. S. 446; *United States* v. *Males*, 51 Fed. 41; *Duncan* v. *United States*, 48 Fed. 2d 128; *People* v. *Eastman*, 188 N. Y. 478, 81 N. E. 459; *People* v. *Wendling*, 258 N. Y. 451, 180 N. E. 169; *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 550, 62 N. E. 2d 840, 844; *Attorney General* v. *Book Named "Forever Amber,"* 323 Mass. 302, 81 N. E. 2d 663; but cf. *United States* v. *Limehouse*, 285 U. S. 424; *Besig* v. *United States*, 208 Fed. 2d 142.

The *Hicklin* formula contained two elements which imposed stringent requirements upon literature. The first of these was that a book was tested, by its supposed influence, not on the average, normal person, but upon those readers who were most susceptible to corruption by virtue of youth, ignorance, or sensual inclination. (*United States* v. *Bennett*, 16 Blatchf. 338, 24 Fed. Cas. No. 14,571; *United States* v. *Clarke*, 38 Fed. 732; cf. *United States* v. *Levine*, 83 Fed. 2d 156, 157.) The second was that the presence of a single objectionable passage sufficed to condemn the entire book. *United States* v. *Bennett*, *supra*; *United States* v. *Kennerley*, 209 Fed. 119; cf. *United States* v. *Levine*, 83 Fed. 2d 156, 157; *Commonwealth* v. *Friede*, 271 Mass. 318, 171 N. E. 472.

This combination of tests drew judicial fire as early as 1913 in *United States* v. *Kennerley*, 209 Fed. 119, in which Judge Learned Hand stated, "I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a

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child's library in the supposed interest of a salacious few * * *." 209 Fed. 119, 120, 121.

The views thus expressed by Judge Hand were subsequently taken up, and the *Hicklin* test was repudiated in the Federal courts, in proceedings under both the postal and tariff laws. The rule now followed there, and generally in the State courts is that a book is to be judged as a whole and in terms of its effect on the average, normal reader. See *United States* v. *Dennett*, 39 Fed. 2d 564; *United States* v. *One Obscene Book Entitled "Married Love,"* 48 Fed. 2d 821; *United States* v. *One Book Entitled "Contraception,"* 51 Fed. 2d 525; *United States* v. *One Book Called "Ulysses,"* 5 Fed. Supp. 182, aff'd 72 Fed. 2d 705; *United States* v. *Levine*, 83 Fed. 2d 156; *Parmelee* v. *United States*, 113 Fed. 2d 729; *Walker* v. *Popenoe*, 149 Fed. 2d 511; *Cain* v. *Universal Pictures Co.*, 47 Fed. Supp. 1013, 1018; *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 548-552, 62 N. E. 2d 840, 843-845; *Attorney General* v. *Book Named "Forever Amber,"* 323 Mass. 302, 81 N. E. 663; *Halsey* v. *New York Society for Suppression of Vice*, 234 N. Y. 1, 136 N. E. 219; *Commonwealth* v. *Gordon*, 66 Pa. Dist. & Co. 101, aff'd 166 Pa. Sup. 120, 70 Atl. 2d 389; cf. *Bantam Books, Inc.* v. *Melko*, 25 N. J. Sup. 292, 96 Atl. 2d 47; *Adams Theatre Co.* v. *Keenan*, 12 N. J. 267, 96 Atl. 2d 519; but cf. *Besig* v. *United States*, 208 Fed. 2d 142.

The doctrine that a book must be considered as a whole does not, of course, mean that obscene matter becomes protected simply by being bound in the same cover with innocent matter. It does contemplate, however, that instances of obscene diction or episodes may be so slight or infrequent as not to impart an obscene flavor to the entire book, (*Commonwealth* v. *Isenstadt*, 318 Mass. 543, 549, 62 N. E. 2d 840, 844; *Attorney General* v. *Book Named*

"Serenade," 326 Mass. 324, 94 N. E. 259;) and that in the context of the whole work, incidents of sexual misconduct may be so presented as to arouse pity or revulsion rather than desire. (See *Attorney General* v. *Book Named "Forever Amber,"* 323 Mass. 302, 81 N. E. 2d 663; *People ex rel. Kahan* v. *Creative Age Press*, 79 N. Y. S. 2d 198; *Commonwealth* v. *Gordon*, 66 Pa. Dist. & Co. 101; *Cain* v. *Universal Pictures Co.*, 47 Fed. Supp. 1013, 1018.) Furthermore, a book is not to be held obscene on the basis of language or episodes which, considered in the light of the work as a whole, do not represent a calculated exploitation of dirt for dirt's sake, but are fairly incident to some other artistic purpose, such as the exposition of some thesis of the author (see *People* v. *Vanguard Press*, 84 N. Y. S. 2d 427; *People ex rel. Kahan* v. *Creative Age Press*, 79 N. Y. S. 2d 198,) or the realistic portrayal of some region, or historical period, or social group (see *United States* v. *One Book Called "Ulysses,"* 5 Fed. Supp. 182, 72 Fed. 2d 705; *Attorney General* v. *Book Named "Forever Amber,"* 323 Mass. 302, 81 N. E. 2d 663; *People* v. *Viking Press*, 264 N. Y. S. 534; *Commonwealth* v. *Gordon*, 66 Pa. Dist. & Co. 101; cf. *People* v. *Berg*, 272 N. Y. S. 586, aff'd 269 N. Y. 514, 199 N. E. 513; *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840.) In such cases the book is said to fall outside the category of the obscene, since taken as a whole its "dominant effect" is not that of exciting sexual desires. *United States* v. *One Book Called "Ulysses,"* 72 Fed. 2d 705; *Parmelee* v. *United States*, 113 Fed. 2d 729; *Walker* v. *Popenoe*, 149 Fed. 2d 511.

The general course of decisions indicates that the work in question is approached as an aggregate of different effects, and the determination turns on whether the salacious aspects are so objectionable as to outweigh whatever affirmative values the book may possess (see *United States*

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v. *Dennett*, 39 Fed. 2d 564.) In the words of Judge Learned Hand, a book should not be proscribed unless it is likely "that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader's hands." (*United States* v. *Levine*, 83 Fed. 2d 156, 158; cf. *Walker* v. *Popenoe*, 149 Fed. 2d 511, 512.) This view appears to be implicit in the decisions which justify obscenity on the ground of social realism and the like, as well as in the so-called "statute of limitations" enjoyed by established classics.

We hold, therefore, that a motion picture is obscene within the meaning of the ordinance if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. In making this determination the film must be tested with reference to its effect upon the normal, average person. Thus defined, the term is no broader and no less definite than as used in the postal laws, under which "prior restraint" has long been exercised through the exclusion of obscene matter from the mails. (18 U. S. C. 1461, 1463; cf. 39 U. S. C. 259a.) We conclude, therefore, that the term "obscene" has achieved a sufficiently precise meaning to describe a class of films which the State may validly suppress; the subject matter hardly admits of greater definiteness. The case before us involves the complete denial of a right to exhibit a film. We need not now decide what other principles, if any, would be applicable if only a part of a film were censored, or if a permit to exhibit to adults only were granted, as the ordinance authorizes. Municipal Code of Chicago, sec. 155-5.

It has recently come to be suggested that even further

limitations are required by the constitution, in that legislation directed against obscenity must be confined to preventing only those forms of overt sexual conduct which are socially undesirable, and must be limited in its application, moreover, to those cases in which it can be said that there is a clear and present danger that the publication will induce such acts. (See *Roth* v. *Goldman*, 172 Fed. 2d 788, 790 (concurring opinion); *Commonwealth* v. *Gordon*, 66 Pa. Dist. & Co. 101.) We agree that the determination that a film or book is obscene must rest on something more than speculation, and that the tendency toward sexual stimulation must be probable and substantial. But we do not agree that the State is limited to the prevention of overt sexual conduct produced by films to the exclusion of consideration of the stimulating tendency which they may have. It may be anomalous to treat obscenity differently from other limitations on free speech, but if so, the difference is one which has long been accepted.

So far as the term "immoral" is concerned, we think that when employed, as here, to describe a basis upon which to impose a prior restraint upon freedom of expression, it must be regarded as little more than a synonym for "obscene." Such, indeed, appears to have been the sense in which the legislative bodies used the term. The power of the city to enact this ordinance derives from section 23-54 of the Revised Cities and Villages Act, which provides simply that the city may "license, tax, regulate, or prohibit * * * theatricals and other exhibitions, shows, and amusements; * * * license, tax, and regulate all places for eating or amusement." (Ill. Rev. Stat. 1953, chap. 24, par. 23-54.) The scope of this power, however, must be considered in connection with other statutory provisions on the subject. Section 224½ of division I of the Criminal Code makes it a misdemeanor to present any "obscene, or

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indecent drama, play, exhibition, show or entertainment." (Ill. Rev. Stat. 1953, chap. 38, par. 470.) Unless the unlikely assumption is made that the city has been granted broader power than the State itself has exercised, the term "immoral" in the ordinance must be construed as referring to that which is immoral because it is obscene. Furthermore, even if we assume that the city council had the power to do otherwise, it seems apparent that it intended to subject to suppression under the ordinance only those films whose exhibition would violate the Criminal Code. Except for the term "immoral," every proscriptive term in the ordinance is drawn from a corresponding section of the Criminal Code. Sections 224a and 224b are followed *verbatim*. (Ill. Rev. Stat. 1953, chap. 38, pars. 471, 472.) Section 224½, it is true, uses the terms "obscene" and "indecent," rather than "immoral," but the latter term, however, is treated in an analogous section of the Criminal Code as being equivalent to "obscene," for section 223 of division I forbids the sale of "any obscene and indecent book * * * or article of indecent or immoral use" and the giving of information as to where "said indecent and obscene articles and things" may be obtained. Ill. Rev. Stat. 1953, chap. 38, par. 468.

The meaning which we assign the term is narrower than that given it in *Block* v. *City of Chicago*, 239 Ill. 251, and *United Artists Corp.* v. *Thompson*, 339 Ill. 595. In the light of *Gelling* v. *Texas*, 343 U. S. 960, it is clear that if the term is given its unrestricted meaning, it would conflict with constitutional requirements. See *Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, 113 N. E. 2d 502; *Broadway Angels, Inc.* v. *Wilson*, 125 N. Y. S. 2d 546; cf. *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146; *Winters* v. *New York*, 333 U. S. 507; *Schuman* v. *Pickert*, 277 Mich. 225, 269 N. W. 152.

The conclusion that a motion picture which is in fact obscene may be censored does not end our inquiry, however, for the ordinance, it is said, leaves the question of obscenity to the discretion of the censors, and makes their determination conclusive in the absence of a showing that it is wholly without reasonable basis. If, as the *Burstyn case* holds, freedom of expression is the rule and limitations upon it the exception, this minimal scope of judicial review, particularly in view of the difficulties inherent in applying the standard of obscenity, does not offer the protection which the constitution requires. (See *Commercial Pictures Corp.* v. *Board of Regents*, 114 N. Y. S. 2d 561, 565, 305 N. Y. 336, 355, 113 N. E. 2d 502, 512, 513 (dissenting opinions); *Roth* v. *Goldman*, 172 Fed. 2d 788, 790, 795 (concurring opinion).) It must be conceded that the cases are virtually unanimous in holding that the censor's determination is presumptively correct and will be upheld so long as there is room for an honest difference of opinion. (*United Artists Corp.* v. *Thompson*, 339 Ill. 595; *People ex rel. Konzack* v. *Schuettler*, 209 Ill. App. 588; *Hutchinson* v. *Garrity*, 218 Ill. App. 161; *Edwards* v. *Thompson*, 262 Ill. App. 520; *Bainbridge* v. *City of Minneapolis*, 131 Minn. 195, 154 N. W. 964; *Thayer Amusement Corp.* v. *Moulton*, 63 R. I. 182, 7 Atl. 2d 682; *In re Franklin Film Mfg. Corp.*, 253 Pa. 422, 98 Atl. 623; *In re Goldwyn Distributing Corp.*, 265 Pa. 335, 108 Atl. 816; *Midwest Photo-Play Corp.* v. *Miller*, 102 Kans. 356, 169 Pac. 1154; *Silverman* v. *Gilchrist*, 260 Fed. 564; *City of Chicago* v. *Kirkland*, 79 Fed. 2d 963; *Commercial Pictures Corp.* v. *Board of Regents*, 114 N. Y. S. 2d 561, aff'd 305 N. Y. 336, 113 N. E. 2d 502.) The latitude given by the courts is illustrated by the fact that it is only on rare occasions that the decision of the censor has been overturned as not within the powers granted by statute or ordinance. See *Fox Film*

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Corp. v. *City of Chicago*, 247 Fed. 231, aff'd 251 Fed. 883; *Schuman* v. *Pickert*, 277 Mich. 225, 269 N. W. 152; *Broadway Angels, Inc.* v. *Wilson*, 125 N. Y. S. 2d 546; cf. *Hygienic Productions, Inc.* v. *Keenan*, 1 N. J. Super. 461, 62 Atl. 2d 150; *Adams Theater Co.* v. *Keenan*, 12 N. J. 267, 96 Atl. 2d 519; Notes, 39 Col. L. Rev. 1383; 49 Yale L. J. 87; 60 Yale L. J. 696; Chafee, Free Speech in the United States, pp. 540-548; I Chafee, Government and Mass Communication, pp. 200-366; Inglis, Freedom of the Movies.

The conclusion which we reach, however, is not that the ordinance should be invalidated because the scope of judicial review is insufficient, but rather that review in such cases should not be so restricted. The decisions so limiting it, in large part, antedate the emergence of the motion picture as a constitutionally protected medium. It is no longer possible to say that the exhibition of a film is a mere "privilege" which the State may withdraw, or permit on such terms as it chooses. Nor again is this an area where other relevant considerations of administrative law suggest that review be narrowly confined. The proceeding by which a permit is denied is not one in which conflicting evidence is heard and resolved in the form of specific findings of fact; the issue to be determined does not involve technical questions whose decision might appropriately be committed to a body of experts; nor is this an area where administrative officials have been entrusted with broad quasi-legislative powers to elaborate substantive policy within the framework of a statute. (See Davis, Administrative Law, p. 927; Note, 65 Harv. L. Rev. 1217.) We think, therefore, that upon review of the censors' action, the plaintiff does not carry a burden of proving that that action was arbitrary and unreasonable, but rather that it must affirmatively be made to appear that the film fairly falls within the proscriptive terms of the ordinance.

We conclude, then, that the city has the power to require the submission of films for censorship and to deny a permit to those which are obscene. It follows that the plaintiffs have no right to exhibit the film unless the permit was wrongfully refused, in which event they may exhibit it upon payment of the required fee. In the view which it took of the case, the trial court had no occasion to determine whether the motion picture was obscene, and the case must therefore be remanded for such a determination.

This disposition of the case makes it necessary to consider the defendants' contention that the issue as to whether or not "The Miracle" is obscene must be submitted to a jury. The proposition is based on the premises that this issue involves only the applicability of the ordinance rather than its validity, and that it may therefore be raised only in an action of *mandamus* brought to compel the issuance of a license. The proposition also presupposes that a trial by jury may still be required in *mandamus* actions, despite the language of the present statute (Ill. Rev. Stat. 1953, chap. 87,) and that the question is an appropriate one for determination by a jury, even though the purpose of the proceeding is to review administrative action. We need not consider whether these latter assumptions are correct, since in the case before us the question of the film's obscenity arises in the course of a suit in equity based upon a constitutional question, and therefore need not be passed upon by a jury.

It is clear that the plaintiffs here could properly proceed by injunction. It is true that *mandamus* is the appropriate form of action where the plaintiff raises no constitutional question and only alleges that the refusal of a license was not authorized by the statute or ordinance in question. (*Illinois Board of Dental Examiners* v. *People ex rel. Cooper*, 123 Ill. 227.) In that situation an injunc-

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tion will not issue. (*Grace Missionary Church* v. *City of Zion*, 300 Ill. 513.) If the plaintiff, however, alleges that one or more of the conditions required for a license are invalid, he may proceed either by *mandamus* or by injunction. *Tews* v. *Woolhiser*, 352 Ill. 212; *Western Theological Seminary* v. *City of Evanston*, 325 Ill. 511.

Whether a complaint alleging only that a motion picture is not obscene would state a ground for equitable relief we need not decide. In the present case the plaintiffs did not so limit their complaint for they asserted that the ordinance was invalid, and claimed the right to exhibit their film without obtaining a permit. We held, in *United Artists Corp.* v. *Thompson*, 339 Ill. 595, that in such a case the plaintiff may proceed by injunction, and that case also shows that the question of the film's obscenity may then be determined in the same proceeding.

Since a suit for an injunction was proper, there can be no objection to the addition to the complaint of a request that the ordinance be expressly declared invalid. The plaintiffs might indeed have asked for a declaratory judgment alone. (*Pioneer Trust & Savings Bank* v. *Village of Oak Park*, 408 Ill. 458.) Defendants' contention that the availability of affirmative relief by way of *mandamus* bars an action for a declaratory judgment is refuted by the explicit language of section 57½ of the Civil Practice Act. (Ill. Rev. Stat. 1953, chap. 110, par. 181.1.) *Goodyear Tire and Rubber Co.* v. *Tierney*, 411 Ill. 421, is not to the contrary. We there held only that a plaintiff desiring to challenge the validity of a tax assessment must pursue the statutory remedies provided by the Revenue Act, and that a declaratory judgment, like an injunction, could not be had in the absence of circumstances supplying a basis for interference with the collection of taxes. The case in no way suggests that an action for declaratory relief is de-

feated by the mere existence of another form of action which could presently be employed.

The decree of the circuit court is therefore reversed and the cause is remanded for further proceedings in conformity with the views expressed in this opinion.

Reversed and remanded, with directions.

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APPENDIX B.

Findings and Order of Circuit Court of Cook County Entered July 21, 1953.

THE COURT FINDS THAT:

1. The court has jurisdiction of the subject matter and the parties to this cause.

2. Plaintiffs have the right to exhibit the motion picture film "The Miracle" without first obtaining a permit under Chapter 155 hereinafter mentioned from any official of the City of Chicago.

3. To the extent that the ordinance set forth in the complaint (Municipal Code of Chicago, Sections 155-1 to 155-7) purports to authorize the City of Chicago to ban the showing of the motion picture film "The Miracle", it is unconstitutional and invaiid.

4. The court deems it unnecessary in this cause to pass on plaintiffs' contention that said ordinance is unconstitutional and invalid in all respects.

The court therefore orders and decrees that defendants, the City of Chicago, Mayor Martin H. Kennelly, Commissioner of Police Timothy J. O'Connor, individually and acting as officers of the City of Chicago, and all police officers, agents, servants, and employees acting for and on behalf of the City of Chicago, be and hereby are perpetually restrained and enjoined from preventing, hindering, or otherwise interfering with the plaintiffs or their officers, agents, or assignees, in the exhibition of the film "The Miracle" in the City of Chicago, Illinois.

APPENDIX C.

The Ordinance Involved.

Chapter 155 of the Municipal Code of the City of Chicago, Sections 1 through 7:

155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, or cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or motion picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the commissioner of police.

It shall be unlawful for any person to lease or transfer, or otherwise put into circulation, any motion picture plates, films, rolls, or other like articles or apparatus, from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the commissioner of police.

The permit herein required shall be obtained for each and every picture or series of pictures exhibited and is in addition to any license or other imposition required by law or other provisions of this code.

Any person exhibiting any picture or series of pictures without a permit having been obtained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's exhibition of each picture or series of pictures without a permit. (Amend. Coun. J. 12-21-39, p. 1396.)

155-2. Before any such permit is granted, an appli-

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cation in writing shall be made therefor, and the plates, films, rolls, or other like apparatus by or from which such picture or series of pictures are shown or produced, or the picture or series of pictures itself as shown or exhibited, shall be shown to the commissioner of police, who shall inspect such plates, films, rolls, or apparatus, or such picture or series of pictures, or cause them to be inspected, and within three days after such inspection he shall either grant or deny the permit. In case a permit is granted, it shall be in writing and in such form as the commissioner of police may prescribe.

155-3. The fee for the original permit in each case shall be three dollars for each one thousand lineal feet of film or fraction thereof, and for each duplicate or print thereof an additional fee of one dollar for each one thousand lineal feet of film or fraction thereof, which fee shall be paid to the city collector before any permit is issued.

155-4. Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship.

If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of **any race, color,** creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final.

155-5. In all cases where a permit for the exhibition of a picture or series of pictures has been refused under the provisions of the preceding section because the same tends towards creating a harmful impression on the mind of children, where such tendency as to the minds of adults would not exist if exhibited only to persons of mature age, the commissioner of police may grant a special permit limiting the exhibition of such picture or series of pictures to persons over the age of twenty-one years; provided, such picture or pictures are not of such character as to tend to create contempt or hatred for any class of law abiding citizens.

When such special permit has been issued, it shall be unlawful for any person exhibiting said picture to allow any persons under the age of twenty-one years to enter the place where same is being exhibited or to remain in said place while any part of said picture or series of pictures is being shown.

Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than twenty-five dollars for each offense, and the admission of each person under twenty-one years of age, or permission to remain or such person under twenty-one years of age, shall constitute a distinct and separate offense.

155-6. The written permit provided for in this chapter shall be posted at or near the entrance of the theater, hall, room, or place where any permitted picture or series of pictures is being exhibited, at such a place and in such a position that it may easily be read by any person entering such theater, hall, room or place at any time when any such permitted picture or series of pictures is being exhibited whether in the day time or in the night time.

155-7. When a permit to show a picture or series of pictures is once granted to an exhibitor, the picture or series of pictures may be shown by any other exhibitor; provided, that the written permit is actually delivered to such other exhibitor and that a written notice of the transfer or lease to such other exhibitor

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is first duly mailed by the transferee or lessee to the commissioner of police. Any number of transfers or leases of the same picture or series of pictures may be made, provided always that the permit is actually delivered to the transferee or lessee and that such written notice be first mailed to the commissioner of police.

Said written notice shall contain the name and a brief description of the picture or series of pictures, the number of the permit, and the location of the building or place where the transferee or lessee proposes to exhibit such picture or series of pictures. The exhibition by any transferee or lessee of any permitted picture or series of pictures without first mailing such notice shall be considered a violation of this chapter, and a separate offense shall be regarded as having been committed for each day's exhibition by a transferee or lessee of each picture or series of pictures without the mailing of such notice.

In case a permit shall be refused for any such motion picture plates, films, rolls, or other like articles or apparatus from which a series of pictures for public exhibition can be produced, it shall be unlawful for any person to lease or transfer the same to any exhibitor of motion pictures or otherwise put the same into circulation for purposes of exhibition within the city.

APPENDIX D.

Order Appealed From.

Order of Illinois Supreme Court entered May 24, 1954.

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error.

THEREFORE, it is considered by the Court that for that error and others in the record and proceedings aforesaid the decree of the Circuit Court of Cook County in this behalf rendered, Be Reversed, Annulled, Set Aside and Wholly for Nothing Esteemed, and this cause be remanded to the Circuit Court of Cook County with directions for further proceedings in conformity with the views expressed in the opinion attached to this mandate.

And it is further considered by the Court that the said appellants recover of and from the said appellees costs by them in this behalf expended to be taxed, and that they have execution therefor.

No. 594. AMERICAN CIVIL LIBERTIES UNION ET AL. *v.* CITY OF CHICAGO ET AL. Appeal from the Supreme Court of Illinois. *Per Curiam:* The appeal is dismissed for want of a final judgment. MR. JUSTICE BLACK, MR. JUSTICE

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DOUGLAS and MR. JUSTICE HARLAN dissent. *Leon Despres* for appellants. Reported below: 3 Ill. 2d 334, 121 N. E. 2d 585.